Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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This issue contains:

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

General Notice

COUNTERTRADE TRANSACTIONS

AGENCY: U.S. Customs Service, Department of Treasury.

ACTION: Information gathering on countertrade activity.

SUMMARY: It has been recognized that for some time a number of U.S. firms have been engaged in international trade using methods that fall under the general term "countertrade". It has been accepted that such trade forms a small portion of total U.S. trade, and moreover, that the foreign products received in the countertrade transactions in many instances are subject to free or specific rates of duty or are shipped to other markets and not imported into the U.S. Therefore, the potential for an impact on the determination of transaction value under the Trade Agreements Act of 1979 has been minimal.

However, in light of the recent changes in various parts of the world resulting in the opening of nonmarket economies, Customs wants to explore the impact of countertrade transactions upon the appraisement of imported merchandise in the future. The Trade Agreements Act of 1979 provides a limited number of conditions that preclude the finding of transaction value, thus requiring the application of one of the other bases of valuation in the hierarchical order. Some forms of countertrade involve these conditions, while others do not.

As a result, Customs has formed a Countertrade Committee to study and prepare a report on the current status of countertrade and its effect on Customs practices. As part of the study, Customs is requesting that companies with experience in countertrade transactions, or those companies contemplating entering into countertrade agreements, provide information describing the transactions. The Countertrade Committee will use this information to prepare a report for Customs and public use.

DATE: Comments should be submitted within 60 days of publication in the CUSTOMS BULLETIN.

ADDRESS: Written comments may be submitted to the Customs Countertrade Committee, c/o Value, Special Programs and Admissibility Branch, Customs Service Headquarters, Room 2104, 1301 Constitution Avenue, N.W., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: John B. O'Loughlin, Chairman of the Customs Countertrade Committee, (202) 566–5853, or Jean Maguire, Area Director, New York Seaport Area, (212) 466–5817.

SUPPLEMENTARY INFORMATION:

BACKGROUND

The Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade (the GATT Customs Valuation Code) was enacted into U.S. law through the Trade Agreements Act of 1979 (19 U.S.C. 1401a; TAA). The TAA became effective for most imported merchandise on July 1, 1980.

The GATT Customs Valuation Code and the TAA established a hierarchical system for appraising merchandise. The six bases of appraisement are: 1) Transaction Value; 2) Transaction Value of Identical Merchandise; 3) Transaction Value of Similar Merchandise; 4) Deductive Value; 5) Computed Value; 6) Value if Other Values Cannot be Determined or Used.

Transaction Value, the preferred method of appraisement, is defined in section 402(b)(1) of the TAA as the "price actually paid or payable for the merchandise when sold for exportation to the U.S." plus specified statutory additions. The "price actually paid or payable" is defined in section 402(b)(4)(A) of the TAA as:

> The total payment (whether direct or indirect * * *) made, for imported merchandise by the buyer, or for the benefit of, the seller.

Thus, transaction value requires a sale of imported merchandise and a direct or indirect payment for the merchandise that benefits the seller. However, the sale and/or the price actually paid or payable for the imported merchandise cannot be subject to any condition or consideration for which a value cannot be determined with respect to the imported merchandise. *See,* section 402(b)(2)(A)(ii) of the TAA.

With these principles in mind, Customs is examining the appraisement of countertrade transactions. In the context of this study, Customs is interested in examining all types of trade that do not result in the buyer making a direct payment in hard currency to the seller for the imported goods. An example of countertrade is a barter transaction in which goods are exchanged for other goods. Other examples include counterpurchase (an exchange of goods for goods and money, or goods for services and money), compensation or buyback (sale of machinery, technology or a plant, in exchange for a portion of the products produced with the furnished items), and off-

set arrangement (the sale of a product occurs on the condition that the exporter incorporates the final product, specified materials, parts or components that the exporter acquired from the country of importation.

In order to ascertain what types of countertrade practices exist or are contemplated in international trade, Customs is requesting that parties experienced with countertrade transactions, or parties that are contemplating transactions pursuant to these type of arrangements, submit information pertaining to the transactions. The information submitted may include a general description of the arrangement, the terms of the agreement, the kind of goods and services involved, and the method of disposal for the merchandise, *i.e.*, goods consumed by importer, sold by importer or trading house, etc., be included in the description of the transaction. Customs will not object if the parties to the transaction are not identified and/or if the commodities involved have been changed. However, in the event that clarification of the transaction is needed, Customs requests that the name and telephone number of a contact person be provided in the submissions, whenever possible.

Customs intends to use the information to publish a report addressing the status of countertrade and the impact of countertrade on Customs valuation practices. The report will be available to the public.

Dated: May 14, 1990.

SAMUEL H. BANKS,
Assistant Commissioner,
Office of Commercial Operations.

U.S. Court of Appeals for the Federal Circuit

IPSCO, INC., AND IPSCO STEEL, INC., PLAINTIFFS-APPELLANTS *v.* UNITED STATES, DEFENDANT-APPELLEE, LONE STAR STEEL CO., DEFENDANT

Appeal No. 89–1486

(Decided April 3, 1990)

Rufus E. Jarman, Jr., Barnes, Richardson & Colburn, of New York, New York, argued for plaintiffs-appellants. With him on the brief was *Josephine Belli.*

Jeanne E. Davidson, Commercial Litigation Branch, Department of Justice, of Washington, D.C., argued for defendant-appellee. *Stuart E. Schiffer*, Acting Assistant Attorney General, *David M. Cohen*, Director and *Platte B. Moring, III*, Attorney, Commercial Litigation Branch, Department of Justice, of Washington, D.C., were on the brief for defendant-appellee. Also on the brief were *Wendell L. Willkie, III*, General Counsel and *Stephen J. Powell*, Chief Counsel for Import Administration, of counsel.

Appealed from: U.S. Court of International Trade.
Judge RESTANI.

Before NEWMAN and MAYER, *Circuit Judges*, and DUMBAULD, *Senior District Judge.**

MAYER, *Circuit Judge.*

OPINION

Ipsco, Inc. and Ipsco Steel, Inc. (Ipsco) appeal the judgment of the United States Court of International Trade, *Ipsco, Inc. and Ipsco Steel, Inc.* v. *United States*, 710 F. Supp. 1581 (Ct. Int'l Trade 1989) (*Ipsco III*), affirming the second remand determination of the International Trade Administration of the Department of Commerce (ITA) that countervailable subsidies are being provided to Canadian manufacturers, producers and exporters of oil country tubular goods and that the net subsidy is 0.66 percent ad valorem for all companies not excluded from the countervailing duty determination.

*Edward Dumbauld, Senior District Judge, United States District Court for the Western District of Pennsylvania, sitting by designation.

BACKGROUND

On July 22, 1985, the Lone Star Steel Company and CF&I Steel Corp., producers of oil country tubular goods (OCTG) in the United States, filed a petition with the ITA alleging that manufacturers and exporters of OCTG in Canada directly or indirectly receive subsidies and that imports of these products materially injure or threaten to materially injure a United States industry. *See* 19 U.S.C. § 1671 (1988); 19 C.F.R. § 355.26 (1988). The ITA initiated a countervailing duty investigation on August 12, 1985. 50 Fed. Reg. 33383. A questionnaire directed to the petitioners' allegations was presented to the government of Canada. Responses were received from it as well as from the provincial governments of Alberta, Ontario and Saskatchewan, and from producers that account for nearly all exports of OCTG from Canada to the United States.

Each of the eleven known Canadian producers and exporters of OCTG filed timely requests for exclusion under 19 C.F.R. § 355.38 (1988). Detailed questionnaires were sent to these companies, and ten of them, including Ipsco, responded. Eight firms reported that they received no benefits and one, Algoma Steel Corp. Ltd., said it did but the ITA determined they were below the de minimis rate of 0.50 percent. Therefore, these nine firms were excluded from the preliminary determination issued on December 19, 1985. 50 Fed. Reg. 53172, 53173. The ITA determined from Ipsco's response that it received countervailable benefits above the de minimis level. *Id.* The responses were verified. Using the data submitted by Ipsco, the ITA preliminarily determined that the estimated net subsidy for OCTG was 0.75 percent ad valorem. *Id.*

The ITA's conclusions remained unchanged in its final affirmative countervailing duty determination issued on April 16, 1986. 51 Fed. Reg. 15037. The above rate applied to all companies except those specifically excluded from the determination. *Id.* Therefore, the rate applied to Ipsco and Siegfried Kreiser Pipe and Tube which did not respond to the ITA's questionnaire. On June 9, 1986, after receiving notice of the International Trade Commission's determination that imports of OCTG from Canada were materially injuring a United States industry, the ITA issued a countervailing duty order. *Id.* at 21783.

The ITA determined that countervailable subsidies were being provided under an investment tax credit program, a regional development incentive program and a general development agreement, and that Ipsco and Algoma received benefits under these programs. 50 Fed. Reg. 15038–40. The benefit was calculated for each company by determining the amount of the tax credit or grant allocable to the review period (calendar year 1984) and dividing that amount by each company's total sales during that period. Grants received by Ipsco for use in its iron and steel production facilities were apportioned between OCTG and other products according to the sales

value of the products. Non-de minimis one-time grants were allocated using the declining balance method over the average useful life of equipment in the steel industry according to Internal Revenue Service tables, 15 years.

Ipsco objected to the countervailing duty determination, because the ITA (1) incorrectly determined that the country-wide rate was the rate found for Ipsco, the only non-excluded company that responded to the ITA questionnaire, when it should have divided the total subsidies provided to all companies by the total sales of all companies, (2) should have apportioned the grants according to the weight of steel in each product rather than according to sales value, and (3) should have amortized the grants over 25 years, which Ipsco uses in its own financial reporting, rather than over 15 years. Ipsco challenged the determination in the Court of International Trade, which upheld ITA's methods of calculating the country-wide rate and apportioning grants among Ipsco's products, but remanded the determination for an explanation of the basis for the choice of a 15-year amortization period. *Ipsco, Inc. and Ipsco Steel, Inc.* v. *United States*, 687 F. Supp. 614 (Ct. Int'l Trade 1988) (*Ipsco I*). In its first remand determination, the ITA reaffirmed that its use of a 15-year period was appropriate, and in *Ipsco, Inc. and Ipsco Steel, Inc.* v. *United States*, 701 F. Supp. 236 (Ct. Int'l Trade 1988) (*Ipsco II*), the court remanded the determination again, holding that the 15 year period is not supported by substantial evidence nor in accordance with law. In its second remand determination, the ITA calculated a 21-year amortization period by dividing the total value of Ipsco's depreciable physical assets by the net depreciation charged per year. Using this allocation period, the net subsidy was determined to be 0.66 percent ad valorem. The Court of International Trade affirmed this determination.

DISCUSSION

Ipsco argues that the trial court erred in upholding the ITA's determination because it excluded those Canadian producers of OCTG that received no countervailable benefits or de minimis benefits from the calculation of a country-wide rate. It maintains that proper adherence to the statutes and regulations governing countervailing duty determinations requires that an average country-wide rate be calculated by dividing the total benefit received by the Canadian industry by the industry's total sales. We agree. We do not agree, however, with Ipsco's other two objections: that the court erred in sustaining the ITA's method of apportioning grants among Ipsco's products and its use of a 21-year amortization period.

In reviewing the trial court's affirmance of the ITA's countervailing duty determination, we must decide whether it correctly concluded that the ITA's methodology is in accordance with law and its conclusions are supported by substantial evidence. We give due weight to the agency's interpretation of the statute it adminis-

ters, and we accept that interpretation if it is "sufficiently reasonable." *Zenith Radio Corp.* v. *United States,* 437 U.S. 443, 450 (1978) (quoting *Train* v. *Natural Resources Defense Council,* 421 U.S. 60, 75 (1975)); *Industrial Fasteners Group. Am. Importers Ass'n* v. *United States,* 710 F.2d 1576, 1580 (Fed. Cir. 1983). On the other hand, we cannot sustain the ITA's exercise of administrative discretion if it contravenes statutory objectives. "Expert discretion is the lifeblood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding, *expertise,* the strength of modern government, can become a monster which rules with no practical limits on its discretion'." *Motor Vehicle Mut. Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 48 (1983) (quoting *Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156, 167 (1962) and *New York* v. *United States,* 342 U.S. 882, 884 (1951) (Douglas J., dissenting)).

Calculation of Net Subsidy:

Section 701 of the Trade Agreements Act of 1979 is the statutory basis for all countervailing duty determinations for countries like Canada that are signatories of the GATT Subsidies Code. Section 701(a) provides in pertinent part:

> If—
>
> (1) the administering authority determines that—
>
> (A) a country under the Agreement, or
>
> (B) a person who is a citizen or national of such a country, or a corporation, association, or other organization organized in such a country,
>
> is providing, directly or indirectly, a subsidy with respect to the manufacture, production, or exportation of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States, and
>
> (2) the Commission determines that—
>
> (A) an industry in the United States—
>
> (i) is materially injured, or
>
> (ii) is threatened with material injury, or
>
> (B) the establishment of an industry in the United States is materially retarded, by reason of imports of that merchandise or by reason of sales (or the likelihood of sales) of that merchandise for importation,
>
> then there shall be imposed upon such merchandise a countervailing duty, in addition to any other duty imposed, equal to the amount of the net subsidy.

19 U.S.C. § 1671(a) (1988). "Subsidy" is defined in subsection 771(5) of the Act:

> (i) Any export subsidy described in Annex A to the Agreement * * *.

> (ii) The following domestic subsidies, if provided or required by government action to a specific enterprise or industry, or group of enterprises or industries, whether publicly or privately owned, and whether paid or bestowed directly or indirectly on the manufacture, production, or export of any class or kind of merchandise:
>
> (I) The provision of capital, loans, or loan guarantees on terms inconsistent with commercial considerations.
>
> (II) The provision of goods or services at preferential rates.
>
> (III) The grant of funds or forgiveness of debt to cover operating losses sustained by a specific industry.
>
> (IV) The assumption of any costs or expenses of manufacture, production, or distribution.

Id. § 1677(5)(A). The next subsection defines "net subsidy", permitting the ITA to offset any gross subsidy by certain fees, taxes, duties, and the like. *Id.* § 1677(6).

Neither the countervailing duty statute nor the applicable regulations promulgated by the Department of Commerce, 19 C.F.R. § 355.0 et seq. (1988), specifically state how a "net subsidy" is calculated. The regulations simply provide: "If the Determination is affirmative, the amount of the net subsidy shall be estimated and stated, and the nature of the subsidy determined. If separate enterprises have received materially different benefits, such differences shall be estimated and stated." *Id.* § 355.33(f).**

When the net subsidy is de minimis, the ITA issues a negative countervailing duty determination. For example, in Welded Carbon Steel Line Pipe From Taiwan, 50 Fed. Reg. 53363 (1985) (final negative determination), the benefits received by the two known producers of the subject goods in Taiwan were allocated over the value of their exports during the review period and found to be 0.02 percent ad valorem and therefore de minimis. In Pads for Woodwind Instrument Keys From Italy, 49 Fed. Reg. 17793 (1984) (final negative determination), the only company that received countervailing benefits was found to have been subsidized at a de minimis rate of 0.05 percent of its total sales. The Department of Commerce has memorialized this practice by regulation, 19 C.F.R. § 355.8 (1988): "For purposes of this part, the Secretary will disregard any aggregate net subsidy that the Secretary determines is less than 0.5% ad valorem, or the equivalent specific rate." *See* 52 Fed. Reg. 30660 (August 17, 1987). But Commerce did not define "aggregate net subsidy" or say how it is to be calculated. It only stated that, where the weighted-average country-wide or company-specific rate is de minimis, no countervailing duty will be assessed. *Id.* at 30662.

**The ITA issued new regulations effective January 26, 1989. 53 Fed. Reg. 52306, 52344 (December 27, 1988), codified at 19 C.F.R. § 355.1 et seq. (1989). Under the new regulations, a person who "did not apply for or receive any net subsidy" may request exclusion from a countervailing duty order, *id.* § 355.14, but persons requesting exclusion who have received a de minimis subsidy when the "weighted-average net subsidy calculated on a country-wide basis" is greater than de minimis are charged an individual rate, *id.* § 355.20(d), (e). The government indicated during oral argument that, under the new regulations, firms that receive a net subsidy of zero or de minimis are included in the calculation of the country-wide average net subsidy.

The ITA excludes from the countervailing duty determination both companies that receive no benefit and those getting de minimis benefits from subsidy programs. But the applicable aspect of the regulation, 19 C.F.R. § 355.38 (1988), provides: "Any firm which does not benefit from a subsidy alleged or found to have been granted to other firms producing or exporting the merchandise subject to the investigation shall, on timely application therefor, be excluded from a Countervailing Duty Order." *See* 45 Fed. Reg. 4932, 4936 (January 22, 1980). This regulation supports the exclusion of companies from a countervailing duty *order*, but it does not direct the ITA to disregard companies receiving little or no subsidy from the calculation of an average net subsidy.

The ITA's practice in taking into account export sales by firms eligible for exclusion in the calculation of the net subsidy varies. For example, in Bricks From Mexico, 49 Fed. Reg. 19564, 19568 (1984) (final affirmative determination and order), the ITA excluded three firms that had filed applications under 19 C.F.R. § 355.38 (1988) and had received no benefits or received benefits in de minimis amounts. Nevertheless, the net subsidy was determined by allocating the countervailable benefits from export financing programs received by the 67 firms identified by the Mexican government over the "total brick exports to the United States during the review period." 49 Fed. Reg. at 19565. In Carbon Steel Wire Rod From New Zealand, 51 Fed. Reg. 7971 (1986) (final affirmative determination and order), on the other hand, the ITA determined the rate at which each of the two known producers and exporters were being subsidized, excluded one of these firms because it received only a 0.04 percent ad valorem subsidy, and charged a countervailing duty equal to the net subsidy (25.69 percent ad valorem) found for the other firm. Similarly, in Certain Carbon Steel Products From Sweden, 50 Fed. Reg. 33375 (1985) (final affirmative determination), the country-wide countervailing duty (8.77 percent ad valorem) was equal to the net subsidy found for the one non-excluded company where there were two known producers and exporters.

It appears, therefore, that the ITA has no consistent method for calculating the net subsidy when there are both producers and exporters receiving a non-de minimis subsidy and others that receive no subsidy or only a de minimis subsidy. This inconsistency about whether companies receiving a de minimis benefit may be ignored in the calculation of the net subsidy is also reflected in the cases from the Court of International Trade. *Compare Fabricas el Carmen, S.A.* v. *United States,* 672 F. Supp. 1465, 1478 (Ct. Int'l Trade 1987) (instructing the ITA not to disregard excluded firms from the calculation of a country-wide rate, where there were over 2,000 producers and exporters) *with Cementos Anahuac del Golfo, S.A.* v. *United States,* 687 F. Supp. 1558, 1568 (Ct. Int'l Trade 1988) (upholding the ITA's determination where there were eight producers and exporters and the ITA excluded the de minimis rates of some

firms from its calculation of a country-wide rate), *rev'd on other grounds*, 879 F.2d 847 (Fed. Cir. 1989).

It strikes us that there is a hint of ad hoc adjudication at work in this scheme. Whether or not this is sustainable as a general proposition, we believe that the method of calculating the rate applied to Ipsco's exports in this case was unreasonable. Congress created a presumption in favor of country-wide countervailing duty rates. 19 U.S.C. § 1671e(a)(2) (1988) (countervailing duty orders "presumptively apply to all merchandise of such kind or class exported from the country investigated"). It was inconsistent with the concept of a country-wide rate for the ITA to disregard those companies receiving no benefit or a de minimis benefit when it determined the amount of the net subsidy and whether it was more than de minimis. "Unlike the antidumping law, which is directed to company-specific activity, the countervailing duty law is directed at government or government-sponsored activity." 53 Fed. Reg. 52306, 52325. The purpose of countervailing duties is to discourage foreign subsidization that results in injury to a United States industry because of unfair competition from cheaper imports. To assess a countervailing duty against a single company that was receiving a benefit just above the de minimis level, when many other producers and exporters received no benefit or an insignificant benefit, does not advance this purpose.

There is no evidence that the Canadian government subsidized "the manufacture, production, or exportation of a class or kind of merchandise", 19 U.S.C. § 1671(a) (1988), only that it attempted to aid a single ailing firm. Where the overall level of subsidization provided to a particular industry by a foreign government is de minimis, no countervailing duty should be assessed. And, if there is a non-de minimis subsidy being provided, the countervailing duty should not exceed the weighted-average benefit received by all firms that produce or export the subject goods, including those firms that receive little or no subsidy.

The country-wide countervailing duty rate that applies to imports from the investigated country must bear some relation to the approximate average rate of subsidization of the subject goods. This rule applies equally to cases, like this one, where there are only a small number of known producers or exporters of the products. This view is compelling in light of 19 U.S.C. § 1671e(a)(2) (1988), which requires the application of the same countervailing duty to all merchandise imported from the country being investigated, unless the ITA "determines there is a significant differential between companies receiving subsidy benefits or a State-owned enterprise is involved."

The ITA's own regulations appear to lead to this conclusion. First, 19 C.F.R. § 355.8 (1988) provides that the Secretary of Commerce will disregard any *aggregate* net subsidy that is less than 0.5% ad valorem. Second, 19 C.F.R. § 355.38 (1988) authorizes the

exclusion of firms from the *countervailing duty order,* but not from the calculation of the amount of the net subsidy. These regulations suggest that the proper procedure is for the ITA to calculate a weighted-average net subsidy by dividing the sum of all the benefits provided in subsidy of the subject goods by the total value of export sales of these goods to the United States. If this net subsidy is de minimis, the countervailing duty determination should be negative.

Apportioning the Grants:

We see no error in the trial court's approval of the method used by ITA to apportion the grants received by Ipsco among its various products. The ITA apportioned the grants according to the sales value of OCTG relative to the sales value of Ipsco's other products that benefited from the grants. The ITA found that the grants were not tied to the production of a particular product. Therefore, it had no basis for concluding that one product was subsidized to a greater extent than any other produced by Ipsco.

Ipsco argues that the countervailable benefits were expressly tied to the production of flat rolled steel in its steel production facility in Saskatchewan; that OCTG is not produced in this facility; that OCTG benefited only from the use of the subsidized flat rolled steel; and that, because the grants benefited only one product, it was irrational to allocate the grants on the basis of sales value, which was disproportionately high for OCTG because of extensive further processing. According to Ipsco, the ITA should have apportioned the grants using a ratio based on the weight of steel produced with the equipment purchased with the grants.

Ipsco's arguments are based on facts that contravene the findings made by the ITA in its final affirmative countervailing duty determination and which the trial court did not disturb. The apportioned grants were made under the Regional Development Incentive Program (RDIP), the General Development Agreement (GDA), and the Canada-Saskatchewan Subsidiary Agreement on Iron, Steel and Other Related Metal Industries. About the RDIP grants, the ITA wrote, "IPSCO and Algoma each received RDIP grants which were used for several facilities producing both OCTG and other products." 51 Fed. Reg. at 15039 (final affirmative determination). On the GDA grants, the ITA found,

> The iron and steel subsidiary agreement in Saskatchewan was intended to enhance the viability of the existing iron and steel industry in the province, to expand and diversify iron and steel production, and to increase employment opportunities in the iron, steel and other related metal industries in Saskatchewan. IPSCO was and still is the only producer in Saskatchewan of pipe (including OCTG) in addition to being the sole steel producer in the province.

51 Fed. Reg. at 15040. According to these findings, Ipsco received RDIP grants for facilities other than its Saskatchewan plant, and the GDA grants were for the general improvement of Ipsco's Saskatchewan steel production facility; they were not tied to any particular product. Ipsco does not suggest that these findings are not based on substantial evidence. Ipsco said in its response to the ITA's questionnaire that both the RDIP and GDA grants were a certain percentage of approved and expended capital costs. Because the grants were not tied to any particular product, it was reasonable for the ITA to use its standard method of apportioning them according to sales value.

Amortization Period:

We also see the ITA's use of a 21-year period over which to amortize the non-recurring grants received by Ipsco as unobjectionable. The ITA calculated this average depreciation period by "subtracting from the total value of [Ipsco's] replaceable physical assets the value of construction in progress (which was not depreciated), and then divided this result by the net depreciation [taken on a straight-line basis] charged during the year." The data was taken from Ipsco's 1984 annual report. Ipsco argues that the ITA should not have considered the useful life of all of its depreciable assets, only those which it actually purchased with the government grants. This is not persuasive because the grants were not tied to the purchase of any particular capital assets. Use of the subsidy to purchase a particular piece of equipment freed other funds for the purchase of other capital assets.

CONCLUSION

Accordingly, the judgment of the Court of International Trade is affirmed in part, reversed in part, and the case is remanded for further proceedings in accordance with this opinion.

COSTS

No costs.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED

HYUNDAI ELECTRONICS INDUSTRIES CO., LTD., APPELLANT *v.* U.S. INTERNATIONAL TRADE COMMISSION, APPELLEE, AND INTEL CORP. AND SEEQ TECHNOLOGY, INC., INTERVENORS-APPELLEES

Appeal No. 89–1600

(Decided April 4, 1990)

Stephen B. Judlowe, Hopgood, Calimafde, Kalil, Blaustein & Judlowe, of New York, New York, argued for appellant. With him on the brief were *Marvin N. Gordon* and *Charles Quinn*.

Judith M. Czako, Office of the General Counsel, U.S. International Trade Commission, of Washington, D.C., argued for appellee. With her on the brief were *Lyn M. Schlitt*, General Counsel and *James A. Toupin*, Assistant General Counsel.

John D. Norris, Arnold, White & Durkee, of Houston, Texas, argued for appellee. With him on the brief were *James J. Elacqua* and *Hilary E. Pearson*. Also on the brief was *Carl Silverman*, Intel Corporation, of Santa Clara, California, of counsel. *James W. Geriak* and *Thomas J. Morgan*, Lyon & Lyon, of Los Angeles, California entered appearances for SEEQ Technology, Inc.

Appealed from: U.S. International Trade Commission.

Before ARCHER, *Chief Judge*, COWEN, *Senior Circuit Judge*, and MAYER, *Circuit Judge*.

MAYER, *Circuit Judge*.

OPINION

Hyundai Electronics Industries Co., Ltd. (Hyundai) appeals from the decision and exclusion order of the United States International Trade Commission (Commission) (1) prohibiting Hyundai from importing to the United States erasable programmable read only memories (EPROMs) that the Commission determined to infringe one or more United States patents, and (2) requiring Hyundai to certify, as a condition of entry, that certain of its secondary products which require EPROMs to function do not contain the infringing EPROMs. *Certain Erasable Programmable Read Only Memories, Components Thereof, Products Containing Such Memories, And Processes For Making Such Memories*, Inv. No. 337–TA–276, USITC Pub. No. 2196 (Mar. 16, 1989) (EPROM Order). We affirm.

BACKGROUND

This appeal and three others presently before the court[1] stem from an investigation instituted by the Commission on September 16, 1987, in response to a complaint filed by Intel Corporation (Intel) of Santa Clara, California. The complaint alleged that Hyundai and six other named respondents had engaged in unfair trade practices in violation of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337 (1982 & Supp. II 1984), by either manu-

[1]The other cases are *General Instrument Corp. and Microchip Technology Inc.* v. *United States Int'l Trade Comm'n*, No. 89–1534 (Fed. Cir. filed Jun. 19, 1989); *Atmel Corp.* v. *United States Int'l Trade Comm'n*, No. 89–1476 (Fed. Cir. filed May 30, 1989); and *Intel Corp.* v. *United States Int'l Trade Comm'n*, No. 89–1459 (Fed. Cir. filed May 17, 1989). The issues presented by Hyundai are entirely distinct from those raised by the appellants in these cases.

facturing EPROMs according to a process covered by, or selling and importing EPROMs that themselves infringed, one or more Intel patents.[2] As required under the version of section 337 then in force, Intel also alleged that the effect or tendency of the unfair methods of competition and unfair acts was to destroy or substantially injure an industry in the United States that was efficiently and economically operated. *See* 19 U.S.C. § 1337(a) (1982).

On August 4, 1988, after the parties had completed discovery and for nine and one-half weeks presented evidence to the presiding administrative law judge, the Senate passed a bill (previously approved by the House of Representatives) amending section 337 to eliminate the complainant's burden of proving domestic economic injury. Anticipating that the President would endorse Congress' action, the administrative law judge decided to admit at the hearing on the economic issues, scheduled to begin August 8, 1988, only evidence pertinent under the amended section 337.

Eleven days after completion of the trial on the economic issues, the President signed the Omnibus Trade and Competitiveness Act of 1988. Pub. L. No. 100–418, 102 Stat. 1107 (Aug. 23, 1988) (OTCA). Section 1342 of the OTCA amended the relevant portions of section 337 to provide:

> **§ 1337. Unfair practices in import trade.**
>
> **(a) Unlawful activities; covered industries; definitions**
> (1) Subject to paragraph (2), the following are unlawful, and when found by the Commission to exist shall be dealt with, in addition to any other provision of law, as provided in this section:
> * * * * * * *
>
> (B) The importation into the United States, the sale for importation, or the sale within the United States after importation by the owner, importer, or consignee, of articles that—
>
> (i) infringe a valid and enforceable United States patent * * *; or
> (ii) are made, produced, processed, or mined under, or by means of, a process covered by the claims of a valid and enforceable United States patent.
>
> * * * * * * *

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[2]For the curious or technically inclined,

> An erasable programmable read only memory (EPROM) is a monolithic integrated circuit containing thousands of metal oxide semiconductor (MOS) transistor cells on which encoded binary information can be stored. The transistor cells in an EPROM are arranged in arrays of rows and columns, permitting individual access to each cell. In addition to the transistor (memory) cells, an EPROM has various other electronic elements, which operate as sensing devices, operating circuits, buffers, etc. EPROMs are used to store programs for various computer operations. EPROMs can be programmed, then erased by the application of ultraviolet radiation and reprogrammed, as the needs of the user dictate.

EPROM Order at 12 (footnotes omitted).

> (2) Subparagraph[ ] (B) * * * of paragraph (1) appl[ies] only if an industry in the United States, relating to the articles protected by the patent * * * concerned, exists or is in the process of being established.
>
> * * * * * * *

19 U.S.C.A. § 1337(a) (West Supp. 1989).

Shortly after the President signed the OTCA, the Commission issued interim rules implementing the act and stated in their preamble that it would apply the amended section 337 to all pending investigations. *Interim Rules Governing Investigations and Enforcement Procedures Pertaining to Unfair Practices in Import Trade*, 53 Fed. Reg. 33,043, at 33,044 (1988). Consequently, the administrative law judge granted Intel's September 16, 1988, motion to amend its complaint and the notice of investigation by deleting allegations that the domestic EPROM industry was efficiently and economically operated as well as injured by the respondents' allegedly infringing activities. The Commission denied Hyundai's petitions for review of both the administrative law judge's decisions limiting the scope of the hearing on the economic issues and allowing Intel's September 16 motion, and the Commission's decision to apply the amended section 337 to the pending EPROM investigation.

Hyundai is a Korean corporation that manufactures a wide array of electrical products, including integrated circuits, computers and related equipment, telecommunications equipment, and electronic automotive parts. It became embroiled in the EPROM investigation, however, not by engaging in these activities but by performing under a manufacturing agreement with another respondent, General Instrument Corporation (General Instrument). As amended, the agreement obligates Hyundai to serve as a "foundry" for EPROMs manufactured according to the mask sets and process flows, and with the technical assistance, of General Instrument. In exchange, General Instrument agrees to purchase at a guaranteed price certain minimum quantities of three types of EPROMs. The agreement also allows Hyundai, upon payment of a royalty, to use EPROMs manufactured in excess of General Instrument's requirements for its own purposes. Hyundai hoped, by exploiting this provision, to procure EPROMs for its own products more cheaply than by purchasing them from third parties like Fujitsu, its primary supplier and an Intel licensee.

Hyundai commenced production of EPROMs for General Instrument in late 1986. The latter routinely took possession of the EPROMs at the Seoul, Korea, airport, shipped them to Taiwan for further processing, and subsequently imported some portion of them to the United States. To date, Hyundai has not fully satisfied General Instrument's EPROM requirements; as a consequence, it has neither used in its own products nor imported in any form into the United States any of the accused EPROMs.

Nevertheless, based upon the administrative law judge's findings that the EPROMs Hyundai produced pursuant to its agreement with General Instrument infringed one or more of four valid and enforceable Intel patents—findings that Hyundai does not challenge—the Commission issued an order "exclud[ing] from entry into the United States for the remaining terms of the patents, except under license of the patent owner or as provided by law," EPROMs "manufactured abroad by Hyundai * * * pursuant to designs and process technology provided to it by General Instrument * * *, whether assembled or unassembled, * * * incorporated into a carrier of any form, * * * [or] assembled onto circuit boards of any configuration." EPROM Order at 6. The order also excluded from entry Hyundai computers, computer peripherals, telecommunications equipment, and automotive electronic equipment containing infringing EPROMs. *Id.* Moreover, because these same "downstream" or "secondary" products are generally of a type that require EPROMs, and because Hyundai has the right under its manufacturing agreement with General Instrument to use excess EPROMs for its own requirements, the Commission included in its order a certification provision:

> Pursuant to procedures to be specified by the U.S. Customs Service, as the Customs Service deems necessary, persons seeking to import computers, computer peripherals, telecommunications equipment, or automotive electronic equipment manufactured by Hyundai * * *, carriers of any form, and/or circuit boards of any configuration, containing EPROMs, shall, prior to the entry or at entry summary of such products into the United States, certify that they have made appropriate inquiry and thereupon state that to the best of their knowledge and belief any EPROMs incorporated into, assembled onto, or contained in such products are not covered by this Order.

Id. at 8.

The Commission recognized that there was no evidence either of the number and type of EPROMs contained in the Hyundai products Intel sought to have excluded, or that Hyundai had in the past exploited or intended in the future to avail itself of the terms of the manufacturing agreement allowing it to use excess General Instrument EPROMs for its own requirements. *Id.* at 126. Nevertheless, the Commission reasoned that, in light of the 1988 amendments to section 337 eliminating proof of injury to a domestic industry as an element of a complainant's case, it would be inappropriate to require a showing that specific Hyundai downstream products caused injury to the domestic EPROM industry before including them within the scope of an exclusion order. *Id.* at 123. Upon balancing Intel's interest in receiving protection from all infringing imports against the risk of disrupting trade in legitimate products, the Commission concluded that this certification provision embodied a reasonable compromise.

DISCUSSION

Hyundai has conceded one of the two issues it originally noticed on appeal: that the Commission illegally applied the amended version of section 337 to the pending EPROM investigation. The remaining issue is whether the Commission properly included Hyundai secondary products within the scope of its limited exclusion order.

A

The parties differ on the threshold issue of what standard of review we apply to Commission remedy determinations. Citing *Fischer & Porter Co.* v. *United States Int'l Trade Comm'n*, 831 F.2d 1574, 1580 (Fed. Cir. 1987), and 5 U.S.C. § 706(2)(E) (1982), Hyundai contends that we must set aside Commission remedy determinations that are unsupported by substantial evidence. The government, on the other hand, asserts that in light of the language and legislative history of section 337, as well as our precedent, the appropriate standard is whether the Commission's choice of remedy is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *See id.* § 706(2)(A).

The government is correct. Section 337(c) provides:

> The Commission shall determine, with respect to each investigation conducted by it under this section, whether or not there is a violation of this section * * *. *Each determination under subsection (d)* [exclusion of articles from entry] *or (e)* [exclusion of articles from entry during investigation except under bond] *of this section shall be made on the record after notice and opportunity for a hearing* in conformity with the provisions of [5 U.S.C. §§ 551–59]. All legal and equitable defenses may be presented in all cases. Any person adversely affected by a final determination of the Commission under subsection (d), (e), (f), or (g) of this section may appeal such determination, within 60 days after the determination becomes final, to the United States Court of Appeals for the Federal Circuit for review in accordance with [5 U.S.C. §§ 701–06]. *Notwithstanding the foregoing provisions of this subsection Commission determinations* under subsections (d), (e), (f) and (g) of this section *with respect to its findings on* the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, the amount and nature of bond, or *the appropriate remedy shall be reviewable in accordance with* [*5 U.S.C. § 706*].

19 U.S.C.A. § 1337(c) (West Supp. 1989) (emphasis added).

Congress clumsily though adequately expressed in this provision a desire to subject Commission determinations on the public interest, the nature of the domestic market, bonding, and remedy, to a less stringent standard of judicial review than determinations of

substantive violations of section 337. Some confusion arises because Congress specified that 5 U.S.C. § 706[3] applies both to the class of determinations that includes the remedy and to determinations under subsections (d) and (e) to exclude goods from entry.

The conflict is only apparent. Section 706(2)(E) makes the substantial evidence standard applicable to agency findings and conclusions in only two instances: "in a case subject to sections 556 and 557" of Title 5 or in a case "otherwise reviewed on the record of an agency hearing provided by statute." There are, in turn, only two instances in which a case is subject to sections 556 and 557: "when rules are required by statute to be made on the record after opportunity for an agency hearing," 5 U.S.C. § 553(c), and "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing," *id.* § 554(a). *See id.* §§ 556(a), 557(a); *see also Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 414 (1971). Therefore, we apply the substantial evidence standard of review only to Commission factual findings underlying determinations to exclude goods from entry under subsections 337(d) and (e), because subsection (c) requires that only those determinations "be made on the record after notice and opportunity for a hearing * * *." We have consistently recognized and applied this principle. *See, e.g., Corning Glass Works* v. *United States Int'l Trade Comm'n*, 799 F.2d 1559, 1565 (Fed. Cir. 1986); *American Hosp. Supply Corp.* v. *Travenol Laboratories, Inc.*, 745 F.2d 1, 6 (Fed. Cir. 1984); *SSIH Equip. S.A.* v. *United States Int'l Trade Comm'n*, 718 F.2d 365, 371 & n.10 (Fed. Cir. 1983).

Of the five other standards of review articulated in 5 U.S.C. § 706(2), only the arbitrary, capricious, abuse of discretion standard contained in subsection (A) is relevant here. Hence Commission findings on the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, United States consumers, the amount and nature of bond, and the appropriate remedy—all are reviewable only for abuse of administrative discretion.

Again, we have previously recognized this principle. In *Viscofan, S.A.* v. *United States Int'l Trade Comm'n*, 787 F.2d 544, 548 (Fed. Cir. 1986), we said that "the Commission has broad discretion in selecting the form, scope, and extent of the remedy, and judicial re-

[3]Section 706 provides:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
>
> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

view of its choice of remedy necessarily is limited." We expressly applied to the remedy determinations of the International Trade Commission the same standard of review applied to like determinations of the Federal Trade Commission: "the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." *Id.* (quoting *Jacob Siegel Co. v. Federal Trade Comm'n*, 327 U.S. 608, 613 (1946)).

We view the "no reasonable relation" language of *Viscofan* as equivalent to the arbitrary, capricious, abuse of discretion standard mandated by section 337(c) for Commission remedy determinations. The touchstone of both is rationality: if the Commission has considered the relevant factors and not made a clear error of judgment, we affirm its choice of remedy. *Citizens to Preserve Overton Park*, 401 U.S. at 416.

B

The Commission's remedy determination in this case readily meets this standard. It represents a careful and common-sense balancing of the parties' conflicting interests as well as other relevant factors and is solidly based on the evidence of record.

> In performing this balancing, the Commission may consider such matters as the value of the infringing articles compared to the value of the downstream products in which they are incorporated, the identity of the manufacturer of the downstream products (*i.e.*, are the downstream products manufactured by the party found to have committed the unfair act, or by third parties), the incremental value to complainant of the exclusion of downstream products, the incremental detriment to respondents of such exclusion, the burdens imposed on third parties resulting from exclusion of downstream products, the availability of alternative downstream products which do not contain the infringing articles, the likelihood that imported downstream products actually contain the infringing articles and are thereby subject to exclusion, the opportunity for evasion of an exclusion order which does not include downstream products, the enforceability of an order by Customs, etc. This list is not exclusive; the Commission may identify and take into account any other factors which it believes bear on the question of whether to extend remedial exclusion to downstream products, and if so to what specific products.

EPROM Order at 125.

The Commission's limited exclusion order requiring Hyundai to certify, as a condition of entry, that certain of its downstream products do not contain infringing EPROMs is a reasonable accommodation of these factors. The Commission found that Hyundai had violated section 337; that specific EPROM chips embodied the violation; that Hyundai remained free under its manufacturing agreement with General Instrument to use excess infringing EPROMs for its own requirements; and that Hyundai could easily

assemble the infringing EPROMs into and import them as part of other Hyundai product "containers" that require EPROMs to function, including wafers, circuit boards, computers, computer peripherals, telecommunications equipment, and automotive electronic equipment. It concluded that the certification provision "is a reasonable means of ensuring the effectiveness of the remedy to which Intel has proven itself entitled." *Id.* at 127. We agree.

The Commission fashioned the remedy with sensitivity and objectivity. It declined to include Hyundai automobiles within the scope of the certification provision because to do so "would not significantly increase the relief afforded complainant." *Id.* at 128. It did not extend the exclusion order to Hyundai EPROMs not manufactured under the General Instrument agreement because they either were not subject to the investigation or were covered by an earlier consent order entered by the Commission. *Id.* at 129. And it refused to issue Hyundai a cease and desist order, *see* 19 U.S.C.A. § 1337(f), (g), because there was no evidence that Hyundai maintained significant inventories of infringing articles in the United States. *Id.* at 130.

Hyundai's challenge strikes us as a thinly veiled and vaguely expressed dissatisfaction with the certification procedure it expects the Customs Service to devise when it implements the Commission's order. But that procedure is not before us and cannot be contested in a proceeding seeking review of the Commission's underlying remedy determination. The Commission's decision in this case to enter a limited exclusion order containing a certification provision is both reasonable and well within its authority. Indeed, we have recognized, and Hyundai does not dispute, that in an appropriate case the Commission can impose a general exclusion order that binds parties and non-parties alike and effectively shifts to would-be importers of potentially infringing articles, as a condition of entry, the burden of establishing noninfringement. *See, e.g., SSIH Equip.*, 718 F.2d at 370.

The rationale underlying the issuance of general exclusion orders—placing the risk of unfairness associated with a prophylactic order upon potential importers rather than American manufacturers that, vis-a-vis at least some foreign manufacturers and importers, have demonstrated their entitlement to protection from unfair trade practices—applies here with increased force. Hyundai has not challenged the Commission's determination that it violated section 337 by manufacturing EPROMs that infringe valid and enforceable Intel patents. Given this and the other findings, we cannot say that the Commission abused its discretion by concluding that Hyundai rather than Intel should bear whatever additional burden the certification provision entails.

CONCLUSION

The decision and order of the International Trade Commission is **AFFIRMED.**

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave

Senior Judges

Morgan Ford

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 90–43)

FORMER EMPLOYEES OF SOUTHERN TRIANGLE OIL CO., PLAINTIFFS *v.* U.S. SECRETARY OF LABOR, DEFENDANT

Court No. 89–03–00158

(Decided May 4, 1990)

Charles Pierson, pro se.

Stuart M. Gerson, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Vanessa P. Sciarra*) for the defendant.

OPINION

MUSGRAVE, *Judge:* The Department of Labor has filed with the Court its revised final determination in this action, pursuant to the Court's Memorandum Opinion and Order of February 14, 1990. The revised determination specifies that the retroactive provisions of the 1988 Trade Act [section 1421(a)(1)(B) of the Omnibus Trade and Competitiveness Act of 1988] apply to the application for worker adjustment assistance of Mr. Charles Pierson and other former employees of Southern Triangle Oil Company who, like Mr. Pierson, meet the requirements of the retroactive provisions as elucidated in the Court's opinion.

The Department correctly recognizes that its revised determination "will not take effect until the Court has entered its final dispositive judgment in this case." The Court here does so.

In accordance with the foregoing, with the Department's revised determination, and with the Court's aforementioned opinion and order in this action of February 14, 1990, judgment is hereby entered for the plaintiffs.

(Slip Op. 90–44)

OLYMPIC ADHESIVES, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 83–10–01441

MEMORANDUM OPINION AND ORDER

MUSGRAVE, *Judge:* In accordance with the decision of the Court of Appeals for the Federal Circuit in *Olympic Adhesives, Inc.* v. *United States*, No. 89–1367 (March 28, 1990), this Court's order of February 17, 1989, affirming the International Trade Administration's use of best information available, is hereby vacated.

This action is remanded to International Trade Administration for proceedings consistent with the decision of the Court of Appeals for the Federal Circuit.

International Trade Administration shall file the results of the remand proceedings with the Court within 30 days of the date of this order.

(Slip Op. 90–45)

A. HIRSH, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 89–06–00366

[Affirmed.]

(Decided May 9, 1990)

Susman & Associates (*Barbar A. Susman*) for plaintiff.

Lyn M. Schlitt, General Counsel, *James A. Toupin*, Assistant General Counsel (*George Thompson*), United States International Trade Commission for defendant.

OPINION

RESTANI, *Judge:* Following the court's instructions on remand in *A. Hirsh, Inc.* v. *United States*, 14 CIT ——, 729 F. Supp. 1360 (1990) (*Hirsh I*), the International Trade Commission (ITC) filed its determination on February 12, 1990, setting forth its reasons for dismissing a request for section 751(b), 19 U.S.C. § 1675(b) (1988), changed circumstances review of an affirmative determination in *Natural Bristle Paint Brushes from the People's Republic of China*, 51 Fed. Reg. 4,662 (1986). The decision before the court involves the initial step in a two-step process under section 751(b) for reviewing an affirmative determination on the basis of changed circumstances. *See Hirsh I*, 14 CIT at ——, 729 F. Supp. at 1363. *See also Citizen Watch Co., Ltd.* v. *United States*, 14 CIT ——, Slip. Op. 90–25 at 8–10 (March 15, 1990). Under this two step process ITC must first determine whether plaintiff has met its burden of showing changed circumstances sufficient to warrant a review. Accordingly, where a plaintiff has not met its burden at the initial stage

by presenting adequate facts to demonstrate sufficient circumstances to warrant initiation of a section 751(b) review, ITC may decline to initiate the process after stating its reasons therefor. *See Hirsh I*, 14 CIT at ——, 729 F. Supp. at 1363 (*citing* 19 C.F.R. § 207.45(3) (1989); *Avesta AB* v. *United States*, 12 CIT ——, 689 F. Supp. 1173, 1175 & 1181 (1988)).

In its February 12, 1990 remand determination ITC concluded that a changed circumstances review was not warranted because the improved conditions described in plaintiff's request for review were attributable to the antidumping order. ITC also found that potentially important factors raised by plaintiff were not supported by the evidence submitted. Such factors included the non-existence of the segment of the domestic industry said to compete with relevant Chinese imports and the supplanting of those imports by other imports following imposition of the antidumping order.

In its briefs following remand[1] plaintiff claims that ITA wrongly discounted its data on the supplanting of Chinese imports by Taiwanese and Korean imports, overemphasized its claims with regard to non-existence of a competing domestic chip brush industry, and ignored the interplay between the various changes and the backdrop of an essentially "healthy" industry.

Discussion

The first factor to be considered is the health of the domestic industry. No one claims that the domestic industry is in death throes or even that it is injured. Plaintiff provided ITC some data obtained from the American Brush Manufacturers Association indicating that certain economic ratios had improved from 1985 to 1987. The ratios do not indicate significant steady, across the board improvements, although some profit increases are indicated. Request for Review at Addendum 4. In opposition to the request for review, petitioners in the original investigation alleged that "the domestic industry" remains in a static position and continues to be vulnerable. Paint Applicators Trade Action Coalition Comments to Request For Review at 2. Overall, a fair description of the industry is that it is fairly healthy but price sensitive and subject to cyclical fluctuations. *See Natural Bristle Paint Brushes from the Peoples Republic of China*, USITC Pub. No. 1805 at A–7–A–9 (1986) (*Final Determination*). Because improved health of the domestic industry and avoidance of an injured condition is the hoped-for outcome of an unfair trade order based on a threat of injury finding, the improvement in condition cited by plaintiff is of little consequence as an isolated fact in terms of whether review is warranted. Nonetheless, the health of the domestic industry is, at least, relevant as a background upon which to consider other factors. *See American Permac, Inc.* v. *United States*, 831 F.2d 269, 275–76 (Fed. Cir. 1987), *cert. dismissed* 485 U&.S. 901 (1988).

[1]The court grants plaintiff's motion to file a reply brief.

The next factors to be considered are alleged decreases in Chinese import inventories and rises in U.S. price. These effects are no more than are to be expected from an order which is intended to eliminate unfair low pricing. Thus, such effects do not aid plaintiff here.

Of potential interest, in connection with other factors,[2] is plaintiff's allegation that China's shift to a market economy will give it greater incentive to raise prices up to or above cost, which may make Chinese brushes non-competitive. Request for Review at 13–18 & Addenda 1–3. Putting aside the factual premises related to price, ITC on remand found that plaintiff had not supported its allegation that this industry was affected by economic and political changes in China.[3] Presumably, evidence would exist of a change of the relevant sector of the Chinese economy to a market-based approach. Plaintiff's allegations in this regard were too general to aid it significantly.

Turning to the two most important changes claimed by plaintiff, the first is non-existence of a competing domestic industry. Request for Review at 8 & Plaintiff's Objections to the U.S. International Trade Commission's Remand Determination at 10 n.5. Apparently, in 1984 most Chinese imports were in the low end chip brush category. *Final Determination* at 12. In its original determination ITC found the existence of a significant domestic chip brush industry. *Id.* at A–17–A–18. ITC also found drastically rising imports, capacity to both increase and shift production, and movement toward higher quality brushes. *Id.* at 11–13. Plaintiff has not provided any information to counteract either ITC's basic finding of existence of a competing domestic industry or the related findings. Therefore, the non-existence of a competing domestic industry cannot be said to be a changed circumstance which would warrant review in this case.

Plaintiff's best supported argument, and the one that is addressed least well by ITC, is its claim that Taiwanese and Korean imports have supplanted Chinese imports to no ill effect.[4] In fact, it appears

[2]Plaintiff also argued in its petition that exchange rate fluctuations since imposition of the order had changed in such a manner as to make renewed importation of natural bristle paint brushes from China "significantly more expensive." Request for Review at 14. Plaintiff maintained that the Commission has recognized in the past that currency fluctuations which make products more expensive to import can be the basis for a negative determination. *Id.* (*citing Portable Electric Typewriters from Japan*, 40 Fed. Reg. 27,079, 27,080 (1975). In its petition plaintiff submitted no data to show that exchange rate fluctuations had indeed made importation of natural bristle paint brushes prohibitive. Furthermore, *Portable Electric Typewriters* on which plaintiff relies did not involve a previous affirmative determination. That determination was based on market conditions which arose *independently* of any artificial import restraints. *See id.* at 27,080. As a point of information the International Trade Administration recently found that "the renminbi is not internationally convertible and the government imposes tight controls on foreign exchange earned through exporting." *Final Determination of Sales at Less Than Fair Value; Certain Headwear From the People's Republic of China*, 54 Fed. Reg. 11,983, 11, 984 (1989). Tight controls suggest a lack of wide ranging fluctuation. This finding was made despite the establishment of "currency swap centers." *Id.* at 11,984–85.

[3]In an unrelated report to the United States Trade Representative regarding foreign investment barriers, ITC recently documented that "China remains committed to the basic principles of a planned socialist economy." *See Foreign Investment Barriers or Other Restrictions that Prevent Foreign Capital from Claiming the Benefits of Foreign Government Programs*, USITC Pub. No. 2212 at 5–3 (1989)

[4]ITC's difficulty may be with plaintiff's ambiguous or shifting argument. Originally plaintiff claimed that natural bristle brushes from Taiwan and Korea supplanted Chinese brushes. Request for Review at 12–13 & 21. But see more general statement at 8. Plaintiff's supporting data were overbroad with respect to natural bristle brushes and were minimized by ITC for this reason. *In re Dismissal of Request for Institution of a Section 751(b) Review Investigation; Natural Bristle Paint Brushes from the People's Republic of China (ITC Remand Determination)* at 9–10. Plaintiff now protests that the broad data involve "like product" and that both natural and synthetic brushes from Taiwan and Korea supplanted Chinese imports. Plaintiff's Reply to Defendant's Response to Plaintiff's Objections at 4.

that Taiwanese imports have surpassed previous Chinese imports. Compare Request for Reviews at Addendum 7 with *Final Determination* at A–29. The thrust of plaintiff's argument is that the domestic demand is absorbing the high influx of brushes. The result claimed is a non-injured and non-threatened domestic industry. Essentially, plaintiff attempts to use the supplantation argument to disprove ITC's "prediction of harm." This is a somewhat unusual approach as will be discussed *infra*.

As a preliminary matter, it must be observed that there is considerable doubt as to whether demand is up greatly or whether imported synthetic brushes, which according to plaintiff are more durable than natural brushes, are being inventoried. Taiwanese brushes were largely synthetic at the time of the final determination. *See Final Determination* at A–29. There is no reason to believe they are the more perishable natural bristle type now. Furthermore, the aforementioned factual dispute is more pertinent to the question of whether non-Chinese imports are threatening the U.S. industry; it does not address directly whether the new imports disprove ITC "prediction of harm," as plaintiff alleges. No data are provided to demonstrate that aggregate Taiwanese, Korean, and Chinese imports are substantially greater now than they were in 1984–85. Such facts might be relevant to the issue of whether ITC's "prediction of harm" was disproved by the fact of supplanting imports, although this factor would not be conclusive. It is too simplistic to assume that just because some large quantity of imports *not* found to be sold at less than fair value (LTFV) does not injure, that *a factiori* ITC's threat analysis with regard to LTFV imports is incorrect.

In past cases ITC has considered the supplanting of imports from one country by those from another in deciding to initiate a changed circumstances review. *See e.g. Birch Three-Ply Door Skins From Japan*, 47 Fed. Reg. 14,978 (1982). Usually, however, this factor is considered in connection with evidence of disappearance of the competing domestic industry following imposition of an order. That is, if the domestic industry cannot fill the gap occasioned by the antidumping order, but rather, other foreign imports do, the purpose of the order is not being fulfilled.[5] Therefore, plaintiff's supplantation argument is not very persuasive as long as there is no evidence of decline of the competing domestic industry to insignificant levels. By themselves supplanting imports do not demonstrate lack of threat or, as plaintiff might phrase it, failure of the "prediction of injury."

China apparently is in a unique position with regard to source of natural bristles, capacity, exporting trends, ability to shift production, and the need to export to the United States, because of action taken against Chinese imports in Canada and because of import restraint agreements with Australia and the European Community.

[5]It may be that this was ITC's reason for emphasizing the existence of the domestic chip-brush industry and related findings.

Final Determination at 12–13. *Compare Television Receiving Sets From Japan*, 46 Fed. Reg. 32,702 (1981) (refusing to modify an antidumping order because of the presence of similar factors). None of these factors was demonstrated to have evaporated since the final determination was issued. Therefore, there is no reason to assume Chinese imports would not reassert themselves if the order were lifted.

Contrary to plaintiff's assertion, the court believes ITC did consider plaintiff's allegations as a whole and did not ignore relevant background data, much of which are not supportive of plaintiff's position. As stated by the court in *Avesta AB* v. *United States*, 12 CIT ——, 689 F. Sup. 1173 (1989) "a request for review of an affirmative injury determination is premised on an underlying finding of dumping, and therefore does not begin on a 'clean slate' * * *. Absent changed circumstances sufficient to warrant review, the outstanding antidumping order should not be disturbed." *Id.* at 1182 (Citation Omitted). Despite plaintiff's assertions following ITC's remand determination, ITC's determination reflects adequately its consideration of plaintiff's contentions.

Accordingly, ITC's determination that changed circumstances do not warrant a review is sustained.

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U.S. Customs Service

General Notice

U.S. Court of Appeals for the Federal Circuit

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Slip Opinions

*U.S. G.P.O. 1990-261-994:80097